Canadian Human Rights Tribunal

2008–09

Departmental Performance Report

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Minister of Justice and Attorney General of Canada

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Chairperson's Message

The human rights landscape in Canada has changed considerably since the *Canadian Human Rights Act* first came into effect in 1978. Amendments to the Act in 1998 resolved long-standing concerns about the impartiality of the Tribunal and established it as an independent entity separate and distinct from the Canadian Human Rights Commission to determine whether discrimination within the meaning of the Act has occurred.

Because the experience of discrimination goes to the very core of who we are, every decision that refines the interpretation of the *Canadian Human Rights Act*—that clarifies what, exactly, discrimination is or isn't—brings us a little closer to the Act's ideals of social justice and inclusiveness. Over the past three decades, Tribunal decisions have provided definitive illustrations of what constitutes sexual harassment, helped diversify the federally regulated workplace, guided employers in accommodating people with disabilities, and fostered awareness in society as a whole of the systemic and often unintentional nature of discrimination and the desirability of proactive, results-based solutions. In ordering remedies, the Tribunal has sought to create a climate in which negative practices and negative attitudes can be challenged and discouraged.

The Tribunal's reinstatement in 2003 of its mediation process has meant that many complaints are resolved without need of a formal hearing. More than 40 percent of cases referred to the Tribunal proceed first to mediation, and more than 70 percent of these reach a mediated settlement. Many such settlements include clauses committing respondents to create or revise institutional policies on discrimination. Mediation also affords the parties the opportunity to share a common understanding and to move on with their lives.

Through its written decisions and its mediation process, the Tribunal has contributed to the Canadian ideals of social inclusion and diversity, serving the public interest at optimal value to the public purse.

J. Grant Sinclair
Chairperson

SECTION I: DEPARTMENTAL OVERVIEW

Raison d'être

The Canadian Human Rights Tribunal is a quasi-judicial body that hears complaints of discrimination referred by the Canadian Human Rights Commission and determines whether the activities complained of violate the *Canadian Human Rights Act* (CHRA). The purpose of the CHRA is to protect individuals from discrimination and to promote equal opportunity. The Tribunal also decides cases brought under the *Employment Equity Act* (EEA) and, pursuant to section 11 of the CHRA, determines allegations of wage disparity between men and women doing work of equal value in the same establishment.

Responsibilities

In hearing complaints under the CHRA and the EEA, the Canadian Human Rights Tribunal considers matters concerning employment or the provision of goods, services, facilities or accommodation. The CHRA makes it an offence for federally regulated service providers and employers to discriminate against any individual or group on one of the following grounds:

- race;
- national or ethnic origin;
- colour;
- religion;
- age;
- sex (includes pay equity, pregnancy, childbirth and harassment, although harassment can apply to all grounds);
- marital status;
- family status;
- sexual orientation;
- disability (can be mental/physical and includes disfigurement and past, existing or perceived alcohol or drug dependence); or
- a conviction for which a pardon has been granted.

The Tribunal's jurisdiction covers matters that come within the legislative authority of the Parliament of Canada, including those concerning federal government departments and agencies, as well as banks, airlines and other federally regulated employers and providers of goods, services, facilities and accommodation. The Tribunal holds public hearings to inquire into complaints of discrimination. Based on evidence and the law (often conflicting and complex), it determines whether discrimination has occurred, and if so, the appropriate remedy to compensate the victim of the discriminatory practice, as well as policy adjustments necessary to prevent future discrimination.

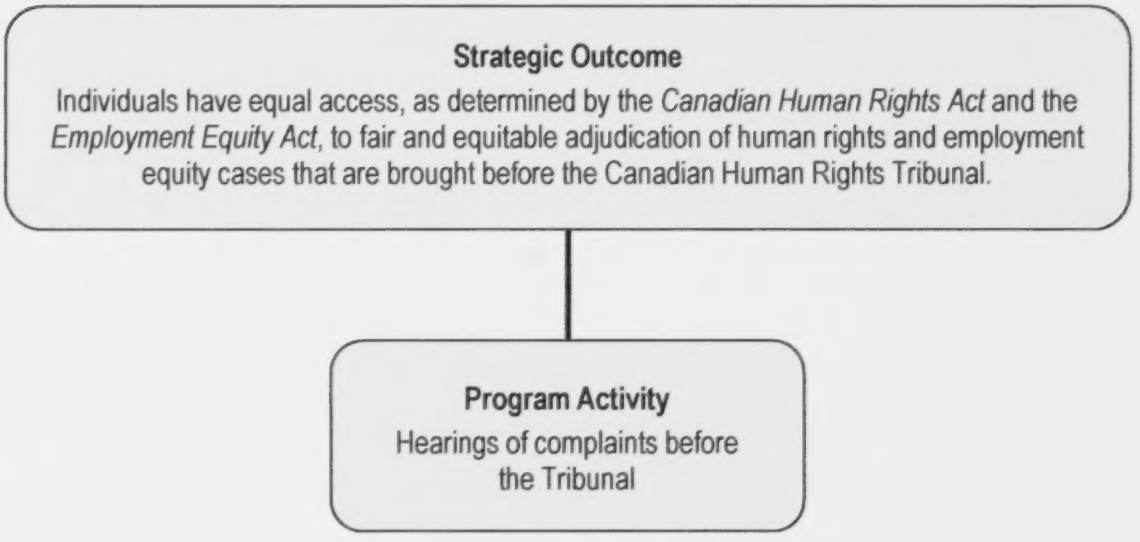
Most of the cases that come before the Tribunal do not involve malicious acts of discrimination. Rather, conflicts arise from long-standing practices, legitimate concerns by employers or conflicting interpretations of statutes and precedents. The role of the Tribunal is to discern the positions of the parties and establish fair and appropriate "rules" to resolve the dispute.

The Tribunal inquires into complaints under the CHRA that are referred to it by the Canadian Human Rights Commission, usually after a full investigation by the Commission. The Commission resolves most of its cases without the Tribunal's intervention. Cases referred to the

Tribunal generally involve complicated legal issues, new human rights issues, unexplored areas of discrimination or multi-faceted evidentiary complaints that must be heard under oath, especially in cases with conflicting evidence that involve issues of credibility.

The Tribunal is not an advocate for the CHRA; that is the role of the Commission. The Tribunal has a statutory mandate to apply the Act based solely on the evidence presented and on current case law. If there is no evidence to support the allegation, then the Tribunal must dismiss the complaint.

Strategic Outcome and Program Activity Architecture


Strategic Outcome
Individuals have equal access, as determined by the *Canadian Human Rights Act* and the *Employment Equity Act*, to fair and equitable adjudication of human rights and employment equity cases that are brought before the Canadian Human Rights Tribunal.
Program Activity
Hearings of complaints before the Tribunal

Summary of Performance

2008–09 Financial Resources (in $ millions)

Planned Spending	Total Authorities	Actual Spending
4.4	4.4	3.9

2008–09 Human Resources (FTEs)

Planned	Actual	Difference
26	26	—

Performance Summary

Strategic Outcome 1: Individuals have equal access, as determined by the *Canadian Human Rights Act* and the *Employment Equity Act*, to fair and equitable adjudication of human rights and employment equity cases that are brought before the Canadian Human Rights Tribunal.		
Performance Indicators	**Targets**	**2008–09 Performance**
Tribunal decisions/rulings	Rendering decisions within 4 months of the close of the hearing, in 80% of cases	Not met. Ongoing review of case management process to improve efficiency.

Program Activity	2007–08 Actual Spending	2008–09 (in $ millions)				Alignment to Government of Canada Outcomes
		Main Estimates	Planned Spending	Total Authorities*	Actual Spending**	
Hearings of complaints before the Tribunal	4.2	4.4	4.4	4.7	3.9	Social Affairs Creating a diverse society that promotes linguistic duality and social inclusion. The Tribunal's singular program, to conduct inquiries into complaints of discrimination in accordance with the CHRA, is a legislatively designed alignment with the government's initiative for creating a diverse society that promotes linguistic duality and social inclusion.
Total	4.2	4.4	4.4	4.7	3.9	

* Total authorities include main estimates, carry-forward revisions and salary compensation amounts.

** Actual spending in 2008–09 was lower than forecast due to imposed government spending freezes and because fewer hearing days were held than in prior years.

Contribution of Priorities to Strategic Outcome

Priority	Type	Status	Linkages to Strategic Outcome
Monitor Tribunal inquiry performance targets.	Ongoing	Partially met	• Hearings of complaints before the Tribunal The Tribunal is continuing to adjust its case management model to assist in ensuring complaint inquiries are conducted in a fair and expeditious manner, as required by the *Canadian Human Rights Act*.
Strengthen the Tribunal's human resources management capacity.	Ongoing	Met	• Hearings of complaints before the Tribunal • Internal services The Tribunal will continue to research, develop and implement corporate and administrative efficiencies to best support and enable an efficient and expeditious Tribunal inquiry process, as required by the *Canadian Human Rights Act*.
Integrate the Tribunal's technology management practices and policies.	Ongoing	Partially met	• Hearings of complaints before the Tribunal • Internal services The Tribunal will continue to research, develop and implement innovative technology solutions and efficiencies to best support and enable an efficient and expeditious Tribunal inquiry process.

Priority 1: Monitor Tribunal inquiry performance targets.

The Tribunal has assessed inquiry performance with regard to the following targets:

- Begin hearings within 6 months of receiving a complaint referral in 70 percent of cases. *Results: 8 percent of hearings conducted in 2008–09 met this target.*

- Render decisions within 4 months of the close of a hearing in 80 percent of cases. *Results: 5 percent of 19 decisions met this target in 2008–09.*

- Conclude inquiries within 12 months in 70 percent of cases. *Results: 71 percent of cases closed in 2008–09 met this target.*

The Tribunal has been successful at opening files and engaging the parties in the inquiry process without undue delay from the time complaints are referred by the Commission. However, the Tribunal continues to face difficulty achieving its other three inquiry performance targets, despite modifications to these targets from the previous fiscal year.

A new approach to case management, introduced in 2005, was designed to help the parties expedite their preparations for hearings. An experienced Tribunal member conducts case management conferences (usually three) with the parties at key pre-hearing intervals to help them understand and meet their obligations (such as disclosure, planning witnesses, experts and evidence) in preparation for hearing. The Tribunal's case manager also sets deadlines for the parties to meet those obligations.

The delays in proceeding to hearing are sometimes a function of the complexity of issues arising from the complaints themselves. More frequently, however, the delays arise in cases where parties are representing themselves and do not have experience presenting a case before a quasi-judicial forum.

The Tribunal makes every effort to help the parties understand the complaint inquiry process. In some instances, especially complaints where the parties become embroiled in issues of higher complexity, members are required to decide a multiplicity of motions and give directions or instructions on questions of evidence or law, all the while mindful of avoiding further delay.

The Tribunal also continues to miss its target for rendering its decisions within 4 months of the close of hearing. Unlike hearings before the courts, where parties are usually represented by lawyers who meticulously organize their facts and arguments, Tribunal hearings routinely involve parties who are without professional legal assistance and who present a morass of facts, evidence and law.

To determine whether discrimination has occurred under the Act, Tribunal members must spend time extracting historical facts, testimony, evidence and law from the complainant's tangled presentation. While timely decision making is important, the need to render quality decisions, both in the interests of the parties and in the public interest, is paramount. Moreover, and especially given the absence of a clause in the Tribunal's empowering legislation that would insulate Tribunal decisions from Federal Court scrutiny, members hearing a complaint must

ensure that their decisions fully address the evidence presented by the parties and provide a complete and cogent synopsis of the law relevant to the complaint to ensure that the decision withstands judicial review.

Meticulous decision making takes time. Nevertheless, given the inherently emotional nature of human rights complaints and their potential impact on the lives of the parties affected, the Tribunal continues to make every effort to render decisions in the shortest possible time. It will continue to scrutinize and adjust its case management model to maximize its efficiency and effectiveness in helping the parties meet their pre-hearing obligations expeditiously.

While the above-mentioned targets remain a challenge, the Tribunal is confident that the efforts undertaken by the Tribunal to meet them are headed in the right direction. A Tribunal assignment schedule has also been designed to ensure that a Tribunal member is available to meet the earliest possible availability of the parties for case management conferences and hearings.

Despite the difficulties in meeting its targets, the Tribunal has avoided a backlog. No cases referred for inquiry by the Commission prior to 2005 remain on the Tribunal's roll and only a small number of complaints—for example, cases that are awaiting judicial interpretation or where decisions are already under reserve—remain outstanding from years 2005, 2006 and 2007.

Priority 2: Strengthen the Tribunal's human resources management capacity.

In 2008–09, the Tribunal:

- completed and implemented an Integrated Business and Human Resources Plan;
- developed a Learning Guideline;
- initiated an organization-wide policy suite review; and
- implemented a new health and safety program.

The Tribunal has remained closely in step with the government's human resources management modernization initiative. In 2008–09, the Tribunal completed its Integrated Business and Human Resources Plan (IBHRP). The IBHRP covers a three-year period, from 2008 to 2011, and follows a process that links the Tribunal's business objectives with its human resources planning. Management at all levels, as well as employees and bargaining agent representatives were consulted during the development of the Tribunal's IBHRP, which received senior management committee approval in November 2008. The Tribunal's IBHRP will next be reviewed for update in late 2010 to ensure continuity in meeting the needs of the Tribunal's mandate and business goals.

The Tribunal continued in 2008–09 to be strongly supportive of learning among its personnel and encouraged employees to pursue excellence in continuous learning and professional development. A Learning Guideline for professional development has now been developed for the Tribunal. Subject to final input from the bargaining agents, approval by the Tribunal senior management committee is scheduled for the fall of 2009.

In support of the government's public service modernization and renewal initiative, the Tribunal has also begun a comprehensive review of its full suite of management policies and practices. This process focuses on ensuring relevance, efficiency and effectiveness of the Tribunal's

policies and alignment with the Tribunal's business processes and planning. Tribunal employees and the bargaining agents have been engaged in this process. Full integration of the Tribunal's revised policy suite with its IBHR is expected to be completed by end of fiscal year 2009–10.

The Tribunal reconstituted its Workplace Health and Safety Committee in 2008–09, based on the new requirements of the *Canada Labour Code*. Although the Tribunal has a complement of only 26 full-time equivalents (employees), it nevertheless is required to have a Workplace Health and Safety Committee. The purpose of the committee is to assist Tribunal management in ensuring that appropriate measures are in place for preventing workplace health and safety hazards. The next step will be to complete an action plan for the Tribunal's Health and Safety Program, planned for 2009–10.

Tribunal personnel, through the Small Agency Administrators' Network (SAAN), continued in 2008–09 to participate in an advisory capacity to the Office of the Comptroller General of Canada to assist with the implementation of the internal audit process for small departments and agencies. The Tribunal has a risk management framework and internal audit plan in place. Steps have also been completed for an internal audit in 2009–10 of the Tribunal's information technology (IT) system security, as a follow-up to the certification received by the Tribunal in 2007–08 under the government's Management of Information Technology Security Standard.

In 2008–09, Tribunal personnel also continued to play a leading role in the SAAN initiative for identifying and developing opportunities for sharing internal services within the community of small departments and agencies.

As a micro agency, the Tribunal harbours no illusions about its limited capacity to help shape the broader federal public service. Nevertheless, the Tribunal will continue to seek out every opportunity to work with other government departments and agencies, especially those of like size and mandate, to assist in meeting the government-wide challenge for greater cost-effectiveness and reduced costs through excellence in human resources management practices. It will also seize opportunities to contribute wherever and whenever possible to public service renewal.

Priority 3: Integrate the Tribunal's technology management practices and policies.

The Tribunal continued to focus on the security and integrity of network infrastructure and data systems in 2008–09. As noted under Priority 2, steps have been completed for an internal audit in 2009–10 of the Tribunal's IT system security as a follow-up to the certification received by the Tribunal in 2007–08 under the government's Management of Information Technology Security Standard.

A major redesign of the Tribunal website was also undertaken in 2008–09 to conform to Common Look and Feel 2.0 standards. Moreover, a complete upgrade of the Tribunal's conference video/audio system was initiated to allow for the integration of the Tribunal's digital voice recording system with its sound and presentation system. New technology was introduced, increasing the Tribunal's ability to offer videoconferencing services via the Internet. This will help reduce case management costs noted under Priority 1.

A business process re-engineering study planned for 2008–09 was delayed because of unexpected heavy demands on the Tribunal's very limited IT resources. The study, which is intended to guide the development of a roadmap document outlining the steps to improve service performance, will be started in early 2009–10. This project will assess the organization's business requirements and develop process improvements that extend business intelligence and real-time reporting capabilities throughout the organization. The Tribunal's IT Section will undertake a subsequent IT-focused project that will evaluate the options for implementation contained in the IT-related recommendations of the roadmap document. Building on the outputs of the first project, the IT project will meet future business needs and include design, implementation, operations and support, allowing for system integration development and implementation of enhancements, with a projected completion by the 2009–10 year-end.

Risk Analysis

The principal risks faced by the Tribunal are the increased pressure on its resources from a heavy and unpredictable workload and its obligations vis-à-vis government-wide horizontal initiatives.

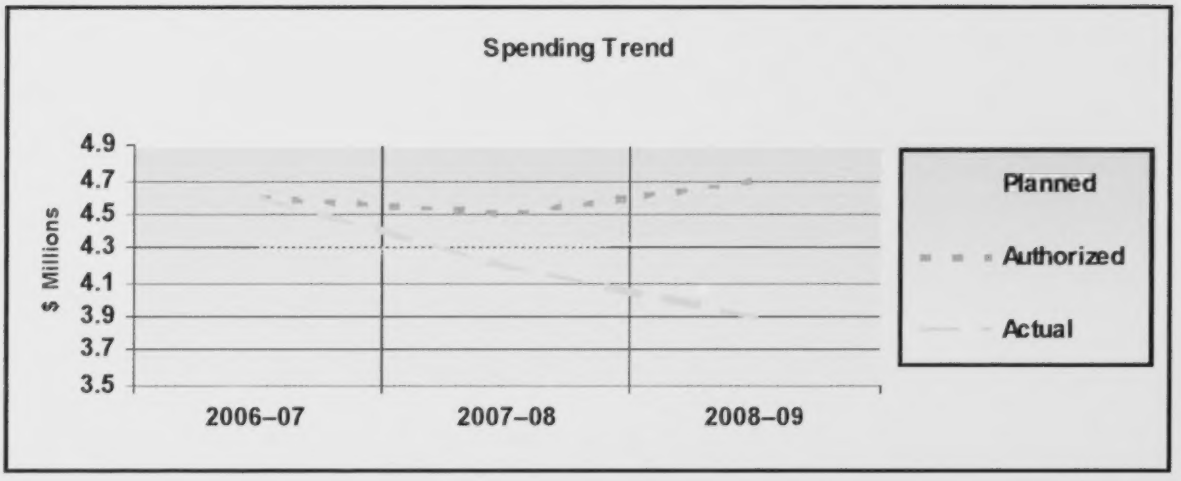
Between 1996 and 2002, the Canadian Human Rights Commission referred an average of 44 human rights complaints to the Tribunal annually. Between 2003 and 2008, that figure averaged 103. The Tribunal's heavy workload is expected to persist into 2009 and 2010, and continue to challenge the Tribunal's resources.

Micro agencies such as the Tribunal typically struggle with the additional resource demands posed by resource-intensive, albeit necessary, horizontal government initiatives. The Tribunal is continuing work on several such initiatives, strengthening its accountability framework and its information management capacity, implementing the internal audit policy, and developing measures to enhance human resources management in the context of public service renewal.

Despite its limited resources, the Tribunal plans to satisfy these significant obligations over the next three fiscal years, using a combination of operational and corporate strategies. Two 2005 initiatives address the risks from its workload challenges: a case management system for closely monitoring the pre-hearing phase of inquiries, and the Tribunal Toolkit, an automated case management system. To ensure the continuity of the expertise needed for addressing the workload risk, the Tribunal is also planning to take steps to enhance human resources retention, knowledge transfer and succession planning. This will be done not only as part of the Tribunal's human resources management approach, but also in line with actions to be developed in 2009–10 in working with the Tribunal's staff to respond to the results of the 2008 federal Public Service Employee Survey.

The Tribunal has adopted a forward-looking approach that is integrated with its business planning process and that broadens the management dimensions of leadership, innovation, probity, transparency and accountability at the Tribunal. In pursuit of broader government-wide outcomes, the Tribunal will continue to actively seek opportunities for sharing and collaboration through new technologies and interdepartmental partnerships. The Tribunal believes this approach will mitigate the pressure caused by horizontal initiatives while ensuring that the Tribunal continues to be well positioned to carry out its mandate.

Expenditure Profile



In each of these years, the planned spending and main estimates amounts were the same. Spending trends remain relatively constant over time. Actual spending amounts shown in this table and in the Performance Summary table do not include services provided without charge by other government departments and agencies of about $1.1 million per year for accommodation provided by Public Works and Government Services Canada and for government payments provided by Treasury Board to employee insurance plans.

An increase in actual spending occurred in 2006–07 due to salary expenses related to retirement and parental benefits paid and due to increased operating costs related to an increase in the number of hearing days held. Actual expenses have since decreased, returning to pre-2006–07 levels.

Voted and Statutory Items
(in $ millions)

Vote # or Statutory Item (S)	Truncated Vote or Statutory Wording	2006–07 Actual Spending	2007–08 Actual Spending	2008–09 Main Estimates	2008–09 Actual Spending
15	Program expenditures	4.2	3.8	4.0	3.6
(S)	Contributions to employee benefit plans	0.4	0.4	0.4	0.3
	Total	4.6	4.2	4.4	3.9

SECTION II: ANALYSIS OF PROGRAM ACTIVITIES BY STRATEGIC OUTCOME

Performance Analysis

The Tribunal's single strategic outcome is that individuals have equal access, as determined by the *Canadian Human Rights Act* and the *Employment Equity Act*, to fair and equitable adjudication of human rights and employment equity cases that are brought before the Canadian Human Rights Tribunal. Its ongoing program priority is to carry on business as usual, that is, to dispose of the complaints brought before it by means of a fair and orderly process of inquiry, including mediated settlement if possible, public hearings and written decisions.

Program Activity by Strategic Outcome

Program Activity: Hearings of Complaints before the Tribunal					
2008–09 Financial Resources ($ millions)			2008–09 Human Resources (FTEs)		
Planned Spending	Total Authorities	Actual Spending	Planned	Actual	Difference
4.4	4.7	3.9	26	26	—

Expected Results	Performance Indicators	Targets	Performance Status	Performance Summary
• Clear and fair interpretation of the *Canadian Human Rights Act* and the *Employment Equity Act*	Timeliness of initiating inquiry process	Initiate inquiry within 10 days of referral in 90 percent of cases	Partially met, ongoing	Performance measurements confirmed
• Access to an adjudication process that is efficient, equitable and fair to all who appear before the Tribunal	Percentage of cases completed within timelines	Commenced hearings within 6 months of receiving a complaint referral in 70 percent of cases (down from 80)	Partially met, ongoing	Performance measurements confirmed
	Percentage of cases completed within timlines	Conclude inquiries within 12 months of referral in 70 percent of cases (down from 80)	Met, ongoing	Performance measurements confirmed
• Meaningful legal precedents for the use of employers, service providers and Canadians	Number of judicial reviews overturned/upheld	Majority of decisions not judicially challenged or upheld.	Met, ongoing	Performance measurements confirmed

Getting Results

As the custodian of a vital piece of Canada's human rights protection machinery, the Tribunal benefits Canadians by increasing the thread count in the fabric of Canadian society. In providing a forum where human rights complaints can be scrutinized and resolved, and by articulating findings and observations on important issues of discrimination in the form of formal decisions, the Tribunal gives effect to the principles enshrined in federal human rights legislation. The proximate result of the Tribunal's program is that complainants can air their grievances and achieve closure in a respectful, impartial forum. In the longer term, Tribunal decisions create meaningful legal precedents for use by employers, service providers and Canadians at large.

Although the Tribunal (including its predecessors) has been part of the human rights landscape in Canada for decades, Tribunal decisions have not always enjoyed the authority they do today. Until recently, allegations of institutional bias and lack of independence undermined the effectiveness of Canada's human rights enforcement machinery, and requests for judicial reviews of Tribunal decisions and rulings were commonplace. For example, all eight of the Tribunal's written decisions issued in 1998 were challenged.

Statutory changes in 1998 raised the stature and perceived independence of the Tribunal, resulting in fewer challenges to Tribunal decisions and greater approbation by the Federal Court when Tribunal decisions are appealed. Ultimately, this acceptance benefits both complainants and respondents, since Tribunal decisions are increasingly perceived as definitive and the parties can get on with their lives. Written decisions become part of the public record. As well as specifying whether a respondent's actions have run afoul of the Act, Tribunal decisions provide guidance, where appropriate, on how to bring policies and practices into line with the legislation to prevent discrimination in future. Such explanations benefit not only the parties involved, but also all employers and service providers and their employees and clients. It is therefore an expected (and sought after) result of Tribunal decisions that they will be accepted by the parties involved and, if judicially challenged, upheld by the reviewing court. Such acceptance benefits all of society since it expedites justice and reduces the cost of protracted appeals.

That's why the Tribunal monitors the number of judicial reviews of its decisions and the proportion of these that uphold or overturn Tribunal decisions. As the table below illustrates, a majority of the Tribunal's 61 decisions issued in the past four years have remained unchallenged, and only six have been overturned.

Judicial Reviews

	2005	2006	2007	2008	TOTAL
Cases referred	99	70	82	103	354
Decisions rendered	11	13	20	17	61
Upheld	1	0	3	0	4
Overturned	1	3	2	0	6
Judicial review withdrawn or struck for delay	0	1	0	2	3
Judicial review pending	0	0	2	2	4
Total challenges	**2**	**4**	**7**	**4**	**17**

Note: Case referral and processing statistics are kept on a calendar year basis only.

What *has* been a challenge in recent years is the effort required to provide speedy justice to complainants. The complexity of cases, the vigorous advocacy at inquiries and the amount of time that Tribunal members must spend resolving pre-hearing issues continue to test the Tribunal's resourcefulness.

The Tribunal remains steadfast in its commitment to striving for the earliest possible disposition of cases. The Tribunal expects that, by helping the parties determine with greater precision which issues must be decided at hearing, active case management will continue to yield major process improvements by reducing the number of issues to be addressed at hearing.

The Tribunal is again this year pleased to report that it has avoided developing a case backlog. This success is largely attributable to an efficient case management process, introduced in 2005, and the success of its mediation program. In 2008, 77 percent of Tribunal-mediated complaints were settled without the need for hearing, compared with 73 percent in 2007, 88 percent in 2006, 87 percent in 2005 and 64 percent in each of 2003 and 2004. Combined with the business process improvements outlined above, the continued success of the Tribunal's mediation service has enabled the Tribunal to process larger numbers of complaints without the need for more financial resources.

At the end of 2008, 105 case files remained active, compared with 98 a year earlier, 100 in 2006 and 147 in 2005.

The Effects of Recent Tribunal Decisions on Canadians

As a key mechanism of human rights protection in Canada, the Tribunal gives effect to the Canadian ideals of pluralism, equity, diversity and social inclusion.

During fiscal year 2008–09, the Tribunal issued 19 final decisions determining whether the CHRA was infringed in a particular instance (subject to rights of judicial review before the Federal Court). Although these decisions have a direct and immediate impact on the parties involved, they also have more far-reaching repercussions, giving concrete and tangible meaning to an abstract set of legal norms. Although the CHRA prohibits discriminatory practices and exempts certain discriminatory practices from remedy, it does not provide examples. Nor does the Act define the term discrimination. Tribunal decisions are therefore the primary vehicle through which Canadians see the impact of the legislation and learn the extent of their rights and obligations under the Act.

The following summaries of Tribunal decisions from 2008–09 illustrate the kinds of complaints brought before the Tribunal and how such cases affect all Canadians. Summaries of these and other Tribunal decisions rendered in calendar year 2008 can be found in the Tribunal's 2008 annual report.

Lavoie v. Treasury Board of Canada **2008 CHRT 27**

The Treasury Board of Canada is the legal employer of Canada's 380,000 federal public servants. Its new Term Employment Policy enables employees to convert their status from temporary to permanent (term to indeterminate) once they have accumulated three years of employment in the federal public service. However, unpaid absences (leaves) longer than 60 days do not count toward the cumulative three-year period. The complainant alleged that the new policy discriminated against women since they, alone, take maternity leave and since they have been more likely than men to avail themselves of parental leave; both types of leave normally exceed 60 consecutive days. Thus it was harder for female employees than for males to accumulate the three years of service required for conversion to permanent employee status.

The Tribunal agreed that the effect of the policy was disproportionately felt by women. In rejecting the respondent's argument that the policy was necessary to give managers enough time to determine whether there was an ongoing need for the position in question, the Tribunal noted that absent incumbents were routinely replaced. It also observed that the policy did not exclude paid leaves from its cumulative service calculation, suggesting that attendance at the workplace was not always necessary to conducting the assessment. In substantiating the complaint, the Tribunal concluded that the respondent had not shown the flexibility and creativity necessary in this case, nor had it examined all the available options. The Tribunal ordered Treasury Board to amend its policies so that maternity and parental leaves counted as cumulative service.

Results for Canadians
Although federal government departments have been subject to the CHRA for three decades, they still sometimes adopt new policies that have the unintended effect of running afoul of the Act. The decision in *Lavoie v. Treasury Board of Canada* illustrates this point. The *Lavoie* decision will affect thousands of female term employees in the federal public service. It also clearly elucidates how a seemingly innocuous staffing policy can render female participation in the public service workforce more precarious than that of men. In particular, the Tribunal's analysis and rejection of the respondent's argument demonstrates that, in matters of human resource management, employers can still undertake accommodation measures without sacrificing flexibility and responsiveness.

Dennis v. Eskasoni Band Council **2008 CHRT 38**

The complainant experienced persistent chronic pain in his head and neck following a serious car accident. After encountering difficult side-effects with the pain medication that his doctors had prescribed for him, he discovered that using marijuana helped to relax him and ease the pain in his shoulders and neck that was associated with "flare-ups" of his condition.

The complainant alleged that the respondent Band Council discriminated against him on the basis of his disability (drug dependency), contrary to section 7 of the CHRA, when the respondent refused to hire him as a deckhand on a fishing boat after he had failed a pre-

employment drug screening test. The complainant also alleged that the respondent's drug screening policy was itself discriminatory within the meaning of section 10 of the CHRA.

The Tribunal concluded that the complainant had not established that he was a disabled person within the meaning of section 25 of the CHRA, which defines disability as including a "previous or existing dependence on alcohol or a drug." The Tribunal was of the opinion that while the evidence clearly showed that the complainant used marijuana and other drugs; he had not established that he was dependent on these drugs.

With regard to the complainant's claim that the respondent's drug policy was discriminatory toward a certain class of individuals (those who are dependent on drugs), the Tribunal agreed, finding that it clearly deprived that class of individuals of the opportunity to work as fishers. However, the Tribunal accepted the Band Council's evidence that this policy was a *bona fide* occupational requirement. Following the test laid out by the Supreme Court in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, the Tribunal determined that: i) the policy was rationally connected to the goal of preventing injuries and damage to property; ii) that the policy was adopted in good faith; iii) that the policy was necessary to the accomplishment of the purpose or goal. With regard to the third criterion, the Tribunal held that impairment of crews on boats put the safety of the entire crew at risk and that the drug and alcohol screening process was thus both necessary and rational. The Tribunal also held that accommodating drug-dependent individuals would impose an undue economic hardship on the respondent. The complaint was dismissed.

Results for Canadians

The issue of drug testing in the workplace continues to be the subject of appellate judicial contemplation across Canada. The Ontario Court of Appeal released a decision on the issue in May 2009, and in 2008 the Supreme Court of Canada denied leave to appeal a workplace drug-testing decision rendered by the Alberta Court of Appeal.

The *Dennis* decision is the Tribunal's latest contribution to this dynamically evolving area of the law. Of particular interest is the Tribunal's finding that the employer's drug testing policy did in fact comply with the CHRA, in that the respondent proved that changing its practices to further accommodate the needs of individuals who are disabled by drug dependency would have caused it undue hardship in terms of both safety and cost. Such a decision provides a measure of guidance to employers wishing to assess the legality of their own drug testing policies.

Morten v. Air Canada **2009 CHRT 3**

The complainant, who was deaf and had very limited vision, attempted to book a flight with the respondent airline. The respondent refused to book the flight unless the complainant agreed to travel with an attendant. The complainant alleged that the respondent's policy constituted discrimination in the provision of services on the ground of disability.

The Tribunal held that the complainant had established a *prima facie* case of discrimination. The evidence was clear that the respondent imposed, as a condition of providing a service to the

complainant, the requirement that he travel with an attendant. This requirement was directly related to the complainant's disability, and affected his freedom to travel.

The question then became whether the respondent had established a *bona fide* justification for the *prima facie* discrimination. After considering the evidence, the Tribunal concluded that the respondent's blanket rule that deaf and blind people must travel with an attendant did not accommodate individuals such as the complainant to the point of undue hardship. Specifically, the rule did not recognize differing degrees of auditory or visual impairment; moreover, the rule did not allow for individual assessment of disabled passengers. The complaint was substantiated.

In considering the appropriate form of redress, the Tribunal reviewed American regulations regarding air travel by disabled passengers, as well as a ruling by the U.S. Department of Transportation on the subject. The American authorities strongly suggested that greater accommodation could be offered by the respondent to the complainant. They also suggested that individuals with both visual and hearing impairments coped better in emergencies than was asserted by the respondent.

The Tribunal noted that the respondent would not accept the degree of risk posed by allowing the complainant to fly unaccompanied yet tolerated the comparable or higher risk posed by some other unaccompanied passengers, such as obese individuals, persons with mobility impairments, pregnant women or individuals who require supplemental oxygen during a flight.

The Tribunal directed the respondent to work with the Canadian Human Rights Commission and the complainant to develop an attendant policy that took into account the communication strategies utilized by people like the complainant to communicate in an emergency, the inherent risk posed by passengers with compromised mobility who are currently allowed to fly unaccompanied, and the fact that in emergencies, many able-bodied passengers are unable to receive, process and act on safety-related emergency instructions. This decision is the subject of two applications for judicial review.

Results for Canadians
Tribunal jurisprudence on the question of discrimination based on disability has to date dealt mostly with the employment relationship and the workplace. The *Morten* decision brings attention to the issue of access to transportation services by persons with disabilities. In particular, the decision provides insightful analysis of the balancing required between a disabled individual's legitimate interest in autonomy—including the voluntary assumption of risk—and a transportation service provider's equally legitimate interest in assuring the safety of the travelling public. The decision also suggests a means of reconciling the two overlapping regulatory regimes governing the accessibility of transportation systems, namely the CHRA, which deals with access by disabled persons to federally regulated services in general, and the *Canada Transportation Act*, which deals with obstacles in the transportation system to the movement of persons with disabilities.

The respondent was a federal member of Parliament who distributed a series of printed brochures to his constituents wherein he made a number of statements regarding Aboriginal persons in the context of the criminal justice system and the operations of government. The brochures exhorted the reader to respond to these statements.

The complainants, who were constituents of the respondent, alleged that the distribution of the brochures constituted a discriminatory practice on the ground of race. In particular, the respondent was alleged to have differentiated adversely in the provision of public services, harassed individuals in the provision of public services, and published representations that expressed discrimination or incited others to discriminate.

The Tribunal first examined the question of whether the distribution of the brochures constituted a "service" within the meaning of the CHRA. The Tribunal found that the brochures were politically partisan documents ultimately designed to influence voter behaviour in the democratic process, to the benefit of the respondent. The brochures provided the respondent with a means to make his political views known and obtain support for his position. As such, the prime beneficiary of a brochure was not the recipient, but the sender. Therefore the distribution of the brochure to the respondent's constituents was not a "service" for the purposes of the Act.

Even if it were a service, the production of the brochure did not create a public relationship between the service provider and the service user: the public was not invited to participate in the creation of the brochures (and thus, the development of their content). The part of the process that most clearly gave rise to the respondent's relationship with the public was the distribution of the brochures, which occurred without discrimination in the sense that everyone was provided with a brochure regardless of race.

Moreover, the Tribunal found that the distribution of the brochures did not amount to the publication of a discriminatory "representation" within the meaning of the Act: the word representation, in the context of the statutory provision in which it was found, was intended to refer to an image, likeness or reproduction, and could not be interpreted to include statements or articles, such as the contents of the impugned brochures.

Given its finding that the brochures were not services, the Tribunal could not accept the allegation that in distributing the brochures, the respondent had engaged in harassment in the provision of services. The complaint was dismissed, and is currently the subject of a judicial review application.

Results for Canadians
Tribunal decisions that interpret the provisions of the CHRA can provide valuable assistance in helping Canadians understand the true meaning of the statute and how it applies to their lives and activities. The *Dreaver* decision is a good example. Prior to *Dreaver*, section 12 of the CHRA had received very little adjudicative consideration, even though it has been in force for 20 years. Thanks to this decision, however, Canadians now have valuable indicators on the extent to which the CHRA applies to discriminatory "representations." This statutory term, which in theory is quite broad in its possible range of meanings, has been given a working definition that will allow individuals and groups to conduct their affairs with greater certainty as to the legal consequences. Similarly, Canadians will benefit from the refinements offered by the Tribunal in its interpretation of the term "services" customarily available to the general public. Case-by-case interpretations of key statutory wording by the Tribunal add certainty to the law, without sacrificing adaptability to as yet unforeseen future situations.

Judicial Review of Tribunal Decisions

More than two thirds of Tribunal decisions in 2008–09 were not the subject of judicial review proceedings. As noted elsewhere in this report, the downward trend in judicial reviews can be seen as an indicator of a greater acceptance of the Tribunal's interpretation of the CHRA by the parties and the reviewing courts.

SECTION III: SUPPLEMENTARY INFORMATION

Financial Highlights

For the Period Ending March 31, 2009
Condensed Statement of Financial Position

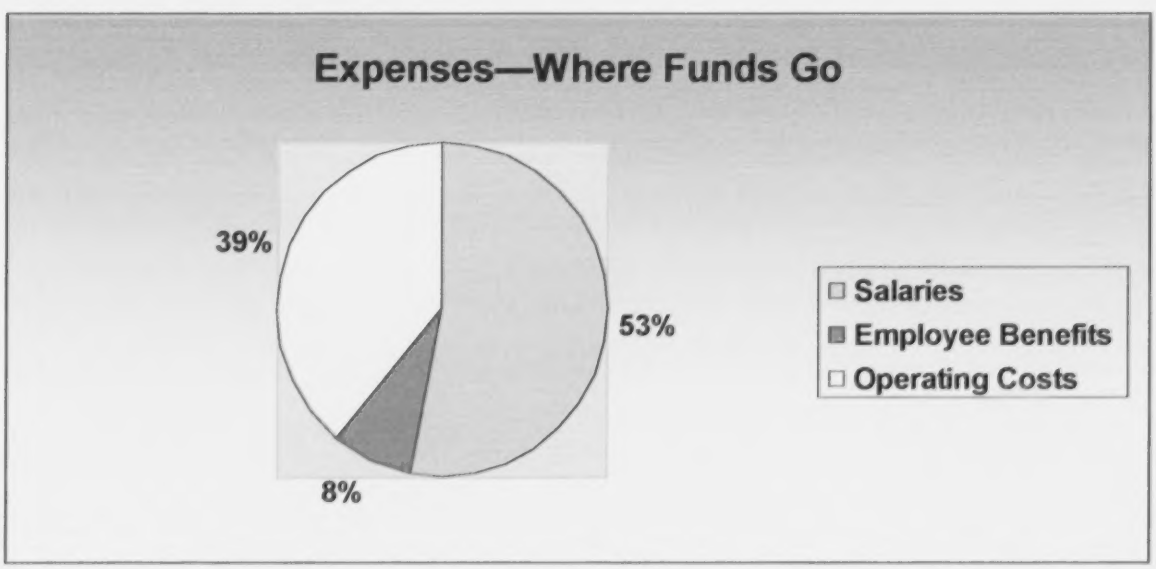
	($ thousands)	Percentage Variance	2009	2008
Assets	Total Assets	27	274	216
Liabilities	Total Liabilities	11	950	856
Equity	Total Equity	6	(676)	(640)
TOTAL		27	274	216

For the Period Ending March 31, 2009
Condensed Statement of Operations

	($ thousands)	Percentage Variance	2009	2008
Expenses	Total Expenses	(5)	4,986	5,238
Revenues	Total Revenues	(50)	1	2
NET COST OF OPERATIONS		(5)	4,985	5,236

The expenses in this table include costs for services provided without charge and other expenses such as amortization for which no funds are disbursed or received. Therefore these figures do not agree with the actual spending amounts shown in other charts and tables.

Financial Highlights Chart



These percentages are based on actual 2008–09 expenditures of $3.9 million and do not reflect costs for services provided without charge or other expenses such as amortization. Major operating costs include travel to hearings across Canada, rental of hearing room facilities and equipment, Tribunal member fees, professional services contracts, and translation costs.

Financial Statements

The Tribunal's financial statements can be found on its website at:
www.chrt-tcdp.gc.ca/NS/reports-rapports/perf-rend-eng.asp.

List of Supplementary Information Tables

The following electronic supplementary information tables can be found on the Treasury Board of Canada Secretariat's website at:
www.tbs-sct.gc.ca/dpr-rmr/2008-2009/index-eng.asp.

- Response to Parliamentary Committees and External Audits
- Internal Audits and Evaluations

Contacts for Further Information and Website

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Legislation and Associated Regulations Administered

The Minister of Justice is responsible to Parliament for the *Canadian Human Rights Act* (R.S. 1985, c. H-6, as amended).
http://laws.justice.gc.ca/en/h-6/index.html

The Minister of Labour is responsible to Parliament for the *Employment Equity Act* (S.C. 1995, c. 44, as amended).
http://laws.justice.gc.ca/en/E-5.401/index.html